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No. 84-698

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH M. SAIZAN,

Petitioner,

v.

RAYMOND DONOVAN,

As Secretary of Labor of the United States of America, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Reply Brief for the Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

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Respondents, in their Opposition (in footnote four, page 6, of their Memorandum) introduce the novel concept that the consent judgment entered in this action during March, 1980, can serve as a bar to a FOIA request filed over two years later:

> "In dismissing petitioner's complaint, the district court apparently found that this IOIA request was also barred by the consent

judgment."(Emphasis added.)

This is the latest in respondent's long line of endeavors to withhold evidence material to plaintiff's petition to have the consent decree set aside. They provide nothing to substantiate their success with their perennial obstructionist tactics in the earier FOIA action serves as an automatic bar to future FOIA requests.

Petitioner, in the complaint filed to have the consent decree set aside, alleged in Paragraph VIII:

> "Defendants Keough, Williams, and Smith, with full knowledge that the group supervised by Plaintiff has an extraordinarily heavy workload, was understaffed, and that the available non-supervisory staff was inexpereinced, conspired to withhold, and did withhold, the support their respective job descriptions required them to provide. When these defendants realized Plaintiff was successfully coping with that situation, they conspired to have defendant Smith directly supervise the group formerly supervised by Plaintiff with the result that training and production virtually stopped for approximately fifty per cent of the time pertinent hereto. This additionally had such a demoralizing effect that the total influence was far greater than the amount of time involved. Defendant Smith, under oath, has testified that essentially all of the work on cases he closed had been completed under Plaintiff's supervision."

The fact that respondents based the denial not on any of the statutory exceptions to the FOIA, but instead include in their reason that an unequivocal violation of the FOIA and the Department of Labor's regulations is supported by the above novel concept, raises every presumption that the withheld files will prove the allegations of Paragraph VIII quoted above. It can also be presumed that the information in the withheld files will contribute materially to proving the duress created by defendants in demoting and involuntarily transferring petioner contributed to petitioner having to sign that consent decree.

Respondent's opposition for the very first time set out with particularity in their memorandum that they recognize petitioner's allegations of fraud rest on events preceding the filing of the complaint dismissed by the consent decree. Quoting from page 2 (of their reply):

> "Specifically, petitioner alleged that '[respondents] used fraudulent means to endeavor to remove petitioner from federal service, resulting in the demotion and involuntary transfer' and that these fraudulent acts '"had a material effect on

[petitioner's] consenting to execute the [consent judgment]"' Pet. 7; see also Pet. 45-47)."

Rule 60(b)(3) applies to judgments obtained through fraud or similar type of misconduct. Respondents in opposition have pointed to nothing in the wording of the law or the jurisprudence indicating the time bar was a general exculpatory provision applying to fraud of any kind occurring at any time. For the Rule 60(b)(3) time bar to inure to the benefit of respondents they would have to show fraud occurring after the complaint was filed in which the consent decree was entered was the cause of petitioner signing the consent decree. They point to nothing indicating that type of fraud and, as a matter of fact, have unequivocally and categorically denied every allegation of fraud or wrongdoing of any kind.

Respondents, in their motion for summary judgment, are encumbered at every step with the burden of ruling out every material issue of fact, having failed to establish a Rule 60(b)(3) time bar to petitioner's entitlement to relief under Rule 60(b)(6).

Respondents, on page 6 of their memorandum, state: "In any case, as shown above, the court in fact, considered the merits of petitioner's entitlement to relief under Rule 60(b)(6) . . . ."

For the court to have "considered the merits" establishes ther were merits to be considered. The jurisprudence is well establilshed that the merits of a case having been passed on by way of summary judgment is adequate grounds for setting aside a summary judgment. In Toebelman v. Missouri-Kansas Pipeline Co. 130 F.2d 1016, 1018 (3rd Cir. 1942), it was held that upon motion for summary judgment, it is no part of the court's function to decide issues of fact but solely to determine whether ther is an issue of fact to be tried. See (to the same effect): United States v. Diebold, Inc.,369 U.S. 654, 655 (1962), and Addickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

By way of example, petitioner in paragraph XVIII of his complaint (filed to have the consent decree set aside) alleges the consent decree was an exchange of legal rights for legal rights and in paragraph XX he mentions that he settled

for less than he was entitled to receive even if the demotion had been lawful. This effectively sets forth an allegation that the settlement was without consideration. The respondents, the district court, and the Fifth Circuit, all failed to address that issue. The means of disproving that allegation is particularly within the scope of government rules and regulations. Respondents by the nature of their employment are in the best position to establish the consideration with which they parted or to explain their silence. Having done neither, they have established a clear issue for trial.

It is respectfully submitted that the summary judgment exceeds the authority of the courts below --- therefore, the petitioner should be granted the writ of certiorari.

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February, 1985